

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE:

B-214024

DATE: June 11, 1984**MATTER OF:**

Hatch & Kirk, Inc.

DIGEST:

1. New grounds of protest must independently satisfy timeliness requirements of GAO Bid Protest Procedures.
2. GAO will only review contracting agency's affirmative determinations of responsibility where there is a showing of fraud on the part of the contracting agency, or where there are allegations that definitive responsibility criteria have been misapplied.
3. Protest contending that contracting agency misapplied definitive responsibility criteria (travel time requirement) is denied where contracting officer has objective evidence favorable to awardee (2 of 3 trips made in required time) to support the responsibility determination.

Hatch & Kirk, Inc. (H&K), protests the award of a shipboard diesel engine repair contract to Aquarius Marine Engines, Inc. (Aquarius), under invitation for bids (IFB) No. WASC-84-00025 issued by the Department of Commerce, National Oceanic and Atmospheric Administration (Commerce). H&K objects to the absence of Service Contract Act, 41 U.S.C. §§ 351, et seq. (1982), wage provisions and determinations in the IFB and to Commerce's affirmative determination of Aquarius' responsibility.

We dismiss in part and deny in part the protest.

Our Bid Protest Procedures require that a protest based upon alleged improprieties in an IFB be filed before the bid opening. 4 C.F.R. § 21.2(b)(1) (1983). For protests filed with us, the term "filed" means receipt in our Office. Shell Computer Systems, Inc., B-203986, July 23, 1981, 81-2 CPD 58. Moreover, where a protester initially files a timely protest and later supplements it with new and

independent grounds of protest, the later-raised allegations must independently satisfy these timeliness requirements. Star-Line Enterprises, Inc., B-210732, October 12, 1983, 83-2 CPD 450. The bids were opened on October 11, 1983, but H&K's allegations concerning the absence of Service Contract Act provisions were not received in our Office until March 7, 1984. Therefore, this aspect of the protest is untimely and will not be considered on the merits.

H&K questions whether Aquarius has the resources and ability to comply with a portion of the IFB entitled "Detailed Specifications for Diesel Engine Repair." H&K alleges that Aquarius lacks: (1) sufficient shop facilities; (2) required geographic location; (3) required special tools; (4) a sufficiently skilled staff large enough to handle the required workload; (5) a purchasing department, and (6) appropriate insurance.

H&K's allegations stem from the following portions of the specifications:

"Contractor Facility Requirements:

"The contractor shall possess shop facilities of sufficient size and equipped to allow all routine overhaul procedures to be carried out 'in house.' The contractor's shop facilities should be located no further away than a normal one-half (1/2) hour commute from the . . . [Commerce] ship base.

"The contractor shall be required to possess all special tools, jigs, fixtures, etc., to carry out all normal overhaul procedures on the listed engines in a factory approved fashion.

"Contractor Personnel Requirement:

"The contractor shall be a specialist in the field of diesel engine repair. The term 'Specialist' shall mean an individual or firm of established reputation (or, if newly organized, whose personnel have previously established a reputation in the same field), which is regularly engaged in and which maintains a regular force of

workmen skilled in repairs required by this contract. The contractor's repair staff shall be such that under normal conditions at least two (2) [Commerce] repair jobs consisting of complete engine overhauls could be manned at one time and completed within a three (3) week period.

"The contractor shall maintain a supervisory and office staff such that cost estimates, parts procurement, detailed cost returns and invoicing can be provided in timely fashion.

"Parts Supply:

"The contractor's organization shall include a purchasing department familiar with procurement of these parts. The purchasing department shall be expected to be diligent in procuring parts at the best possible prices."

Commerce's preaward survey found that Aquarius had the resources and ability to perform the contract. H&K asks us to review that determination.

As a general rule, GAO does not review contracting agencies' affirmative determinations of responsibility. See Central Metal Products, Incorporated, 54 Comp. Gen. 66, 67 (1974), 74-2 CPD 64. There are two exceptions to this rule: (1) where there is a showing of fraud on the part of the contracting agency and (2) where there are allegations that definitive responsibility criteria have been improperly applied. See Data Test Corporation, 54 Comp. Gen. 499, 501-503 (1974), 74-2 CPD 365. H&K argues that allegations (4) and (5) are definitive responsibility criteria. Commerce, on the other hand, takes the position that only allegation (2) is a definitive responsibility criterion.

In determining whether a contracting agency's application of a specific IFB responsibility provision is reviewable under the second exception, we distinguish between performance requirements which merely state how the work is to be accomplished and definitive responsibility criteria which the IFB presents as preconditions of award. Performance requirements do not become definitive responsibility criteria just because they are stated in detail. Contra Costa Electric, Inc., B-190916, April 5, 1978, 78-1 CPD 268.

We find the IFB's "Contractor Facility Requirements," which underlie H&K's allegations (1) through (3), to be performance requirements which essentially require that all of the work be properly performed within the confines of the awardee's facility. The IFB's "Contractor Personnel Requirements" and "Parts Supply" requirement, H&K's allegations (4) and (5), are also performance requirements. The work is required to be performed by workmen known to be regularly engaged in the kind of work called for under the contract. Moreover, enough of these workmen shall be available to meet certain minimum levels of agency demand. Again, the requirement that personnel familiar with the procurement of diesel parts (a purchasing department) be used to purchase required parts is a description of how the work is to be performed and not a precondition to award. Since there is objective evidence relevant to the definitive responsibility criterion favorable to Aquarius, we find Aquarius meets the criteria. As to allegation (6), we will not consider H&K's argument that Aquarius is not responsible because it does not have required insurance coverage because the insurance requirement is not a definitive responsibility criterion. See Triple "A" South, B-193721, May 9, 1979, 79-1 CPD 324.

However, having a facility within the required travel time, allegation (2), is a precondition of award and, consequently, a definitive responsibility criterion. Oceanside Mortuary, B-186204, July 23, 1976, 76-2 CPD 74. As noted above, the applicable solicitation provision requires that the contractor's "facilities should be located no further away than a normal one-half (1/2) hour commute from the . . . base." The record shows that on two of three attempts, the trip was made by agency personnel within the required travel time. Since the determination whether a bidder complies with a definitive criterion of responsibility is a matter within the reasonable discretion of the contracting officer, we find no basis to conclude that the contracting officer abused his discretion on this evidence. DOT Systems, Inc., B-193153, March 7, 1979, 79-1 CPD 160.

Accordingly, the protest is dismissed in part and denied in part.

for *Milton J. Arnold*
Comptroller General
of the United States